

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

C. NICHOLAS PEREOS aka COSTA N.
PEREOS,

Plaintiff,

v.

NATIONSTAR MORTGAGE, LLC, et al.,

Defendants.

Case No. 3:13-cv-00386-MMD-VPC

ORDER

I. SUMMARY

Before the Court is Plaintiff's Objection to Petition for Removal (dkt. no. 9), construed as a motion to remand, Defendant Nationstar Mortgage, LLC's ("Nationstar") Motion to Set Aside Default and Vacate Default Judgment (dkt. no. 22-1), and Defendant Mortgage Electronic Registration System, Inc.'s ("MERS") Motion to Dismiss (dkt. no. 8). For the reasons set forth below, Plaintiff's request for remand is denied, Nationstar's Motion is granted, and MERS' Motion is granted.

II. BACKGROUND

Plaintiff C. Nicholas Pereos purchased the property located at 2141 Hussium Road, Unit 205, Las Vegas, Nevada. (Dkt. no. 1-1 at 31.) Mr. Pereos obtained a loan of \$100,000 ("the Loan") from Charter Funding ("Charter"), and executed a promissory note ("Note") that was secured by a deed of trust on the property ("Deed of Trust") for \$100,000. (Dkt. no. 8-1.) The Deed of Trust names Charter as lender, Nevada Title

1 Company as trustee, and MERS as beneficiary. (*Id.*) The Deed of Trust was recorded on
2 January 10, 2005, in the official records of Clark County, Nevada. (*Id.*)

3 On July 16, 2013, three days before Defendants removed this case, an
4 assignment of the Deed of Trust was signed by MERS as nominee of Charter in favor of
5 Nationstar Mortgage LLC (“Nationstar”). (Dkt. no. 8-2.) The Assignment was recorded in
6 Clark County on July 18, 2013. (*Id.*)

7 Defendants removed the instant action on July 19, 2013. The Court agrees that it
8 is difficult to ascertain the causes of action that Plaintiff intends to bring. Defendants’
9 uncontested representation is that Plaintiff advised defendants that his claims are for:
10 (1) negligence; (2) defamation; (3) “liable to creditworthiness”; (4) slander; (5) breach of
11 contract; and (6) breach of the covenant of good faith and fair dealing. (Dkt. no. 8 at 3.)
12 All claims seem to be derived from Plaintiff’s allegation that Defendants caused it to be
13 reported publically and to credit reporting agencies that Plaintiff was delinquent on his
14 mortgage with the intent to adversely affect Plaintiff’s credit rating and financial credit
15 worthiness. (See dkt. no. 1-1 at 32.)

16 **III. JURISDICTION**

17 Following Defendants’ removal of the instant action, Plaintiff filed an “Opposition
18 to Petition for Removal of Action.” (Dkt. no. 9.) While not filed properly as a Motion to
19 Remand, the Court will address the jurisdictional issues raised by Plaintiff.

20 **A. Legal Standard**

21 Federal courts are courts of limited jurisdiction, having subject-matter jurisdiction
22 only over matters authorized by the Constitution and Congress. U.S. Const. art. III, § 2,
23 cl. 1; see e.g., *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). A
24 suit filed in state court may be removed to federal court if the federal court would have
25 had original jurisdiction over the suit. 28 U.S.C. § 1441(a). However, courts strictly
26 construe the removal statute against removal jurisdiction, and “[f]ederal jurisdiction *must*
27 be rejected if there is any doubt as to the right of removal in the first instance.” *Gaus v.*
28 *Miles, Inc.*, 980 F.2d 564, 566 (9th Cir. 1992) (emphasis added). The party seeking

1 removal bears the burden of establishing federal jurisdiction. *Durham v. Lockheed Martin*
2 *Corp.*, 445 F.3d 1247, 1252 (9th Cir. 2006).

3 To establish subject matter jurisdiction pursuant to diversity of citizenship, the
4 party asserting jurisdiction must show: (1) complete diversity of citizenship among
5 opposing parties, and (2) an amount in controversy exceeding \$75,000. 28 U.S.C.
6 § 1332(a). Where a defendant removes a plaintiff's state action on the basis of diversity
7 jurisdiction, the defendant must either: (1) demonstrate that it is facially evident from the
8 plaintiff's Complaint that the plaintiff seeks in excess of \$75,000, or (2) prove, by a
9 preponderance of the evidence, that the amount in controversy meets the jurisdictional
10 limit. *Valdez v. Allstate Ins. Co.*, 372 F.3d 1115 (9th Cir. 2004). In considering what
11 evidence may be considered under (2) above, the Ninth Circuit has adopted the
12 "practice of considering facts presented in the removal petition as well as any 'summary-
13 judgment[sic]-type evidence relevant to the amount in controversy at the time of
14 removal.'" *Matheson v. Progressive Specialty Ins. Co.*, 319 F.3d 1089, 1090 (9th Cir.
15 2003) (quoting *Singer v. State Farm Mut. Auto. Ins. Co.*, 116 F.3d 373, 377 (9th Cir.
16 1997)).

17 For jurisdictional purposes, the amount in controversy is determined by the
18 amount at stake in the underlying litigation. *Theis Research, Inc. v. Brown & Bain*, 400
19 F.3d 659, 662 (9th Cir. 2005). In determining the amount in controversy, a district court
20 may consider the amount of compensatory and punitive damages recoverable based on
21 plaintiff's complaint as well as attorney fees, but may not consider interest and cost of
22 suit. *Meisel v. Allstate Indem. Co.*, 357 F. Supp. 2d 1222, 1225 (citing *Hunt v. Wash.*
23 *State Apple. Adver. Comm'n*, 432 U.S. 333, 347-48 (1977)).

24 **B. Discussion**

25 Plaintiff makes a number of arguments against federal court jurisdiction. First,
26 Plaintiff argues that federal jurisdiction is not appropriate in this case given that
27 Defendant Charter is in bankruptcy. In Defendants' Petition for Removal, they explain
28 that Charter is a trade name under which Magnus Financial Corporation ("First Magnus")

1 conducted business. (Dkt. no. 1 at 3.) They further explain that First Magnus/Charter
2 filed for Chapter 11 bankruptcy protection on August 21, 2007, before Plaintiff brought
3 his case. (*Id.* at 3–4.) Plaintiff asserts that as a result, litigation in this case must be
4 stayed as to all Defendants. The Court disagrees. The language of 11 U.S.C. § 362
5 extends only to actions against the debtor. Circuit courts, including the Ninth Circuit,
6 have therefore consistently held that 11 U.S.C. § 362 stays litigation only against the
7 debtor. *See, e.g., Boucher v. Shaw*, 572 F.3d 1087, 1092 (9th Cir. 2009).

8 Second, Plaintiff suggests that removal was improper as Charter did not join the
9 Petition for Removal. However, where a defendant is in bankruptcy at the time suit is
10 brought against it, that defendant is construed as “fraudulently joined” and need not
11 consent to removal. *Brown v. Jevic*, 575 F.3d 322 (3d Cir. 2009); *see also Wankowski v.*
12 *Taylor Bean & Whitaker Mortg. Corp.*, No. 2:10-cv-538, 2010 WL 2757324, at *1 (D.
13 Nev. July 8, 2010).

14 Finally, Plaintiff argues that removal was not timely and that Nationstar was not a
15 diverse party. MERS, the last served Defendant and removing party, was served on July
16 1, 2013 (dkt. no. 1, Ex. C), and the Petition for Removal was filed on July 19, 2013 (dkt.
17 no. 1). Removal was therefore timely. Defendant Nationstar is a Delaware limited liability
18 company, with a principle place of business in Texas and therefore diverse. (See dkt. no.
19 14 at 5.)

20 The Court therefore will exercise jurisdiction over this case and denies Plaintiff’s
21 request for remand.

22 **IV. MOTION TO SET ASIDE DEFAULT AND VACATE DEFAULT JUDGMENT**

23 Plaintiff filed his lawsuit in the Second Judicial District Court of Nevada on
24 January 24, 2013, and served Nationstar through its registered agent in February 2013¹.

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26
27 ¹ Nationstar represents that they were served on February 15, 2013 (dkt. no. 1-1
28 at 2), while Plaintiff represents that it served Nationstar on February 21, 2013 (dkt. no. 1-1 at 79). Neither party cites to a document in support of its date therefore the Court cannot determine which is correct. For the purpose of this Order, this small discrepancy is not significant.

1 Nationstar did not respond to the complaint and judgment was entered against it on May
 2 20, 2013 (Dkt. no. 1-1 at 58). On June 12, 2013, Nationstar filed its Motion to Set Aside
 3 Default and Vacate Default Judgment. (Dkt. no. 22-1.) The Court has reviewed the
 4 Motion, Plaintiff's Opposition (dkt. no. 22-2), and Nationstar's Reply (dkt. no. 22-3).

5 **A. Legal Standard**

6 Although default was entered in state court, the Federal Rules of Civil Procedure
 7 govern the setting aside of such a default subsequent to removal. See *Butner v.*
 8 *Neustadter*, 324 F.2d 783, 785–86 (9th Cir. 1963). Pursuant to Rule 55(c), a district court
 9 may set aside the entry of default upon a showing of good cause. Once default judgment
 10 has been entered, relief is governed by Rule 60(b). Where a defendant seeks relief
 11 under Rule 60(b)(1) based upon “excusable neglect,” the court applies the same three
 12 factors governing the inquiry into “good cause” under Rule 55(c). *U.S. v. Signed*
 13 *Personal Check No. 730 of Yubran S. Mesle*, 615 F.3d 1085, 1091 (9th Cir. 2010). In
 14 determining whether good cause exists, a court must consider three factors:
 15 “(1) whether the plaintiff will be prejudiced, (2) whether the defendant has a meritorious
 16 defense, and (3) whether culpable conduct of the defendant led to the default.” *Brandt*
 17 *v. Am. Bankers Ins. Co. of Fla.*, 653 F.3d 1108, 1111 (9th Cir. 2011) (quoting *Falk v.*
 18 *Allen*, 739 F.2d 461, 463 (9th Cir. 1984)). These factors, which are consistently referred
 19 to as the “*Falk* factors,” are disjunctive. *Brandt*, 653 F.3d at 1111 (quoting *Falk*, 739
 20 F.2d at 463) (emphasis in original). The court may refuse to set aside the default if it
 21 holds any one of the three factors is true. *Mesle*, 615 F.3d at 1091.

22 “[J]udgment by default is a drastic step appropriate only in extreme
 23 circumstances; a case should, whenever possible, be decided on the merits.” *Mesle*,
 24 615 F.3d at 1091 (quoting *Falk*, 739 F.2d at 463) (alteration in original). The *Falk*
 25 factors are more liberally applied in the context of a clerk's entry of default than in the
 26 default judgment context. *Mesle*, 615 F.3d at 1091 n.1 (quoting *Cracco v. Vitran Exp.,*
 27 *Inc.*, 559 F.3d 625, 631 (7th Cir. 2009)); see also *Haw. Carpenter's Trust v. Stone*, 794
 28 F.2d 508, 513 (9th Cir. 1986). “The court's discretion is especially broad where . . . it is

entry of default that is being set aside, rather than a default judgment.” *Aristocrat Techs, Inc. v. High Impact Design & Entm’t*, 642 F. Supp. 2d 1228, 1233 (D. Nev. 2009) (quoting *O’Connor v. State of Nev.*, 27 F.3d 357, 364 (9th Cir. 1994)).

B. Discussion

1. Whether Defendant engaged in culpable conduct

“A defendant’s conduct is culpable if he has received actual or constructive notice of the filing of the action and *intentionally* failed to answer.” *TCI Group Life Ins. Plan v. Knoebber*, 244 F.3d 691, 697 (9th Cir. 2001) (emphasis in original). In order for a failure to answer to be intentional, “the movant must have acted with bad faith.” *Mesle*, 615 F.3d at 1092. “A movant cannot be treated as culpable simply for having made a conscious choice not to answer.” *Id.* If a defendant neglectfully² fails to answer, yet offers a “credible, good faith explanation negating any intention to take advantage of the opposing party, interfere with judicial decision making, or otherwise manipulate the legal process[,]” he or she is not necessarily culpable. *TCI Group*, 244 F.3d at 697-98 (holding that defendant’s family emergency explanation for missing the deadline to answer a motion for summary judgment was “weak, but not the result of ‘deviousness or willfulness.’”) (quoting *Bateman v. U.S. Postal Service*, 231 F.3d 1220, 1225 (9th Cir. 2000)). Culpable behavior “usually involves conduct by parties that is calculated to help them retain property in their possession, and avoid liability by staying out of court: for instance, when companies act to avoid service in order to thwart their customers’ attempts to bring suit against them.” *Mesle*, 615 F.3d at 1094.

Nationstar represents that its paralegal Jaleesa Komolafe was responsible for reviewing its registered agent, Corporation Service Company’s (“CSC”) website each week to ensure that all new lawsuits were identified and referred for handling. (Dkt. no. 22-1 at 2.) She also was responsible for reviewing each week the prior week’s listings to

²In this context, “[n]eglect” ‘encompasses simple, faultless omissions to act and, more commonly, omissions caused by carelessness.’” *TCI Group*, 244 F.3d at 697 (quoting *Pioneer Inv. Servs Co.v. Brunswick Assocs Ltd. P’ship*, 507 U.S. 380, 388 (1993)).

1 confirm that CSC did not upload service information for the prior week after she had
 2 reviewed that week's listings. (See *id.* at 2–3.) Nationstar represents that Ms. Komolafe
 3 did not see a listing for the instant case when she reviewed the CSC website the week of
 4 February 15, 2013, and that in a “one-time deviation from her normal practice, Ms.
 5 Komolafe forgot to go back to the prior week to ensure she identified and assigned every
 6 new case for handling.” (*Id.* at 3.) Nationstar, therefore, represents that its failure to
 7 respond was due to an inadvertent failure to timely assign the case for handling. (See
 8 *Id.*)

9 Plaintiff has presented no evidence of bad faith as it relates to Nationstar's failure
 10 to respond to Plaintiff's Complaint in a timely fashion. Accordingly, because Nationstar
 11 immediately moved to set aside entry of default and because Nationstar's explanation for
 12 missing the deadline demonstrates that it did not intend “to take advantage of the
 13 opposing party, interfere with judicial decision making, or otherwise manipulate the legal
 14 process,” the Court holds that Nationstar has not engaged in culpable conduct. *TCI*
 15 *Group*, 244 F.3d at 697–98.

16 **2. Whether Defendant has a meritorious defense**

17 “A party in default . . . is required to make some showing of a meritorious defense
 18 as a prerequisite to vacating an entry of default.” *Haw. Carpenters' Trust Funds*, 794
 19 F.2d at 513. The defendant's burden is minimal. *Mesle*, 615 F.3d at 1094. “All that is
 20 necessary to satisfy the ‘meritorious defense’ requirement is to allege sufficient facts
 21 that, if true, would constitute a defense” *Id.* at 1094 (quoting *TCI Group*, 244 F.3d at
 22 700). “A meritorious defense is one which, if proven at trial, will bar plaintiff's recovery.”
 23 *Aristocrat Techs*, 642 F. Supp. 2d at 1233 (quoting *Accu-Weather, Inc. v. Reuters Ltd.*,
 24 779 F. Supp. 801, 802 (M.D. Pa. 1991)). “[M]ere legal conclusions, general denials, or
 25 simple assertions that the movant has a meritorious defense’ are, however, insufficient
 26 to justify upsetting the underlying judgment.” *Cassidy v. Tenorio*, 856 F.2d 1412, 1415
 27 (9th Cir. 1988) (quoting *In re Stone*, 588 F.2d 1316, 1319 (10th Cir. 1978)). “To permit
 28 reopening of the case in the absence of some showing of a meritorious defense would

1 cause needless delay and expense to the parties and court system.” *Haw. Carpenters’*
2 *Trust Funds*, 794 F.2d at 513.

3 Nationstar has not presented any facts which might constitute a defense.
4 Therefore, this factor weighs in favor of Plaintiff.

5 **3. Whether the Plaintiff will be prejudiced**

6 Plaintiff will not be prejudiced by setting aside the clerk’s entry of default. “To be
7 prejudicial, the setting aside of a judgment must result in greater harm than simply
8 delaying resolution of the case.” *TGI Group*, 244 F.3d at 700. Rather, “the delay must
9 result in tangible harm such as loss of evidence, increased difficulties of discovery, or
10 greater opportunity for fraud or collusion.” *Id.* at 701 (citing *Thompson v. Am. Home*
11 *Assur. Co.*, 95 F.3d 429 (6th Cir. 1996)).

12 In its Opposition, Plaintiff does not allege that setting aside the clerk’s entry of
13 default will prejudice it in any way. Further, because Nationstar filed its Motion to Set
14 Aside Default quickly after the Clerk’s Entry of Default, it is unlikely that there has been
15 an opportunity for fraud or collusion or that Plaintiff has suffered a loss of evidence or will
16 encounter an increased difficulty of discovery. For these reasons, this factor weighs in
17 favor of Nationstar.

18 Although the Court may refuse to set aside default if it finds one of the factors is
19 true, the Court’s discretion remains especially broad. *Mesle*, 615 F.3d at 1091; *Aristocrat*
20 *Techns*, 642 F. Supp. at 1233. Since two of the three factors in the “good cause”
21 analysis for setting aside a default under Rule 55(c) favor Defendant, the Court grants
22 Defendant’s Motion to Set Aside and Vacate Default. Defendant did not engage in
23 culpable conduct and setting aside the default will not prejudice Plaintiff. Therefore, the
24 Court holds that refusing to set aside the default would be contrary to the Ninth Circuit’s
25 long held policy in favor of deciding cases on the merits whenever possible. *Mesle*, 615
26 F.3d at 1091 (quoting *Falk*, 739 F.2d at 463).

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V. MOTION TO DISMISS

A. Legal Standard

A court may dismiss a plaintiff's complaint for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). A properly pled complaint must provide "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). While Rule 8 does not require detailed factual allegations, it demands more than "labels and conclusions" or a "formulaic recitation of the elements of a cause of action." *Ashcroft v. Iqbal*, 556 US 662, 678 (2009) (citing *Papasan v. Allain*, 478 U.S. 265, 286 (1986)). "Factual allegations must be enough to rise above the speculative level." *Twombly*, 550 U.S. at 555. Thus, to survive a motion to dismiss, a complaint must contain sufficient factual matter to "state a claim to relief that is plausible on its face." *Iqbal*, 556 U.S. at 678 (internal citation omitted).

In *Iqbal*, the Supreme Court clarified the two-step approach district courts are to apply when considering motions to dismiss. First, a district court must accept as true all well-pled factual allegations in the complaint; however, legal conclusions are not entitled to the assumption of truth. *Id.* at 679. Mere recitals of the elements of a cause of action, supported only by conclusory statements, do not suffice. *Id.* at 678. Second, a district court must consider whether the factual allegations in the complaint allege a plausible claim for relief. *Id.* at 679. A claim is facially plausible when the plaintiff's complaint alleges facts that allow a court to draw a reasonable inference that the defendant is liable for the alleged misconduct. *Id.* at 678. Where the complaint does not permit the court to infer more than the mere possibility of misconduct, the complaint has "alleged — but not shown — that the pleader is entitled to relief." *Id.* at 679 (internal quotation marks omitted). When the claims in a complaint have not crossed the line from conceivable to plausible, the complaint must be dismissed. *Twombly*, 550 U.S. at 570.

A complaint must contain either direct or inferential allegations concerning "all the material elements necessary to sustain recovery under some viable legal theory."

1 *Twombly*, 550 U.S. at 562 (quoting *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101,
2 1106 (7th Cir. 1989) (emphasis in original)).

3 **B. Discussion**

4 Defendant argues that Plaintiff's complaint is "difficult to decipher" and that it
5 cannot determine how many causes of action Plaintiff is attempting to assert and what
6 those causes of action are. (See dkt. no. 8 at 4.) Defendants represent that Plaintiff
7 advised defendants that his claims are for: (1) negligence; (2) defamation; (3) "liable to
8 creditworthiness"; (4) slander; (5) breach of contract; and (6) breach of the covenant of
9 good faith and fair dealing. (Dkt. no. 8 at 3.) While Plaintiff has not contested this
10 representation, Defendant does not indicate how Plaintiff advised defendants. It is not
11 the role of the Court to guess at Plaintiff's claims nor accept Defendant's
12 characterization.

13 Plaintiff's complaint is, therefore, so deficient that the Court cannot ascertain the
14 causes of action or the facts upon which they rely. The complaint does not give fair
15 notice of the claims or factual allegations to allow MERS to answer or defend itself.
16 Plaintiff's opposition does not clarify the issue as it does not address Defendant's
17 arguments regarding each claim. At best, the complaint offers legal conclusions not
18 afforded the assumption of truth. While Plaintiff is representing himself pro se, given that
19 he is an attorney he "cannot take advantage of the leniency granted either to non-
20 attorneys, or to clients who have been victimized by the poor draftsmanship of their
21 attorneys." *Wolfgram v. State Bar of Cal.*, No. 95-15643, 1996 WL 393839, at *3 (9th Cir.
22 May 13, 1996). Accordingly, Plaintiff has failed to state a claim upon which relief can be
23 granted.

24 Even if the Court were to accept Plaintiff's claims to be the six represented by
25 Defendants, Plaintiff's Complaint cannot survive Defendant's Motion. Each claim
26 appears to relate to loan servicing errors and improper credit reporting. As MERS
27 explains, it neither services loans nor performs any credit reporting functions. See
28 *Cervantes v. Countrywide Home Loans, Inc.*, 656 F.3d 1034, 1038–40 (9th Cir. 2011).

1 Indeed, it is not a signatory to the deed of trust, as a nominee beneficiary, and thus not
2 party to a contract with Plaintiff. As a result, none of the claims raised by Plaintiff, as best
3 construed by the Court, can be brought against MERS.

4 **VI. CONCLUSION**

5 The Court notes that the parties made several arguments and cited to several
6 cases not discussed above. The Court has reviewed these arguments and cases and
7 determines that they do not warrant discussion as they do not affect the outcome of the
8 Motion.

9 It is therefore ordered that Plaintiff's Objection to Petition for Removal (dkt. no. 9),
10 construed as a motion to remand, is denied.

11 It is further ordered that Nationstar Mortgage, LLC's Motion to Set Aside Default
12 and Vacate Default Judgment (dkt. no. 22-1) is granted.

13 It is further ordered that Defendant Mortgage Electronic Registration System,
14 Inc.'s Motion to Dismiss (dkt. no. 8) is granted. Accordingly, all claims against Defendant
15 MERS are dismissed.

16 DATED THIS 28th day of February 2014.

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20 MIRANDA M. DU
21 UNITED STATES DISTRICT JUDGE
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